

REDACTED - PUBLIC VERSION

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT
OF PENNSYLVANIA - FRANKLIN COUNTY BRANCH

	:	INVESTIGATING GRAND JURY
	:	
In re: Grand Jury	:	No: MD-516-2016 ✓
Investigation No. 18	:	
	:	
	:	Honorable Carol L. Van Horn

OPINION AND ORDER OF COURT

Filed FEB 13 2019

Kimberly Kulpak
dep Clerk

Before Van Horn, J.

**IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT
OF PENNSYLVANIA - FRANKLIN COUNTY BRANCH**

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INVESTIGATION #18

Upon Motion of the Franklin County District Attorney, an Investigating Grand Jury (hereinafter "IGJ") was convened, selected, and empaneled for its first session on February 9, 2017. The initial 18-month term of the IGJ was extended for a period of 6 months at its request and cases were heard through January 18, 2019. A total of 19 cases were submitted to the IGJ for its consideration.

On May 18 2018, a Notice of Submission of Investigation #18 was presented to President Judge Carol L. Van Horn, the supervising judge of the IGJ, for approval. The purpose of the investigation was set forth as "an investigation concerning allegations of prior sexual abuse by [REDACTED] (hereinafter [REDACTED]) upon numerous children over the past 40 years, and potential attempts to influence victims from disclosing the crimes over that time frame." Said investigation was approved by the supervising judge.

Evidence concerning Investigation #18 was presented over the course of 7 months. Victim #1 testified on May 18, 2018 and Victim #2 and his mother provided testimony on June 15, 2018. Additional Victims #3 and #4 appeared before the IGJ on October 19, 2018 to present their testimony.

Detective David Rush of the Franklin County District Attorney's Office conducted an interview of [REDACTED], the alleged perpetrator of offenses, on November 30, 2018. Two weeks later, on December 14, 2018, the testimony of Victim #5 was presented via Skype from [REDACTED] as was the testimony of [REDACTED].

Per normal procedure, [REDACTED] was colloquied by the supervising judge in advance of his testimony wherein he was provided notice of his right to consult with an attorney prior to his testimony, to have an attorney present with him during testimony and to consult with an attorney following his testimony. He was also advised that if he wished to appear before the IGJ without an attorney and changed his mind during the course of his testimony, he need only request that the questioning stop. [REDACTED] indicated that he understood his rights and that he wished to proceed with presenting testimony before the IGJ without an attorney's advice prior to the questioning.

A Grand Jury Report (hereinafter "Report") was issued on December 21, 2018 concerning Investigation #18. Pursuant to this Court's Order, the Report was

served upon [REDACTED] with notice of his right to submit a written response no later than January 3, 2019.

A Notice of Appearance was entered by Attorney Stephanie L. Cesare on behalf of [REDACTED] on December 27, 2018 and Orders were issued granting [REDACTED] Motion to Extend Time to Respond to Grand Jury Report and his Motion to Seal to January 14, 2019.

Thereafter [REDACTED] filed an Objection and Response to Grand Jury Report by Named Individual and this Court set Argument for January 22, 2019. At Argument, [REDACTED] was represented by Attorneys Stephanie Cesare and Brian Platt. District Attorney Matt Fogal was present for the Commonwealth.

ISSUES FOR RESOLUTION

[REDACTED] raised the following issues in his Objection and Response that were developed at Argument:

1. The Report submitted is not contemplated in the definition of "investigating grand jury report" provided in 42 Pa.C.S.A. Section 4542 where the purpose of the report is to seek justice for alleged victims by destroying [REDACTED] name and reputation. The proposed administrative action is but a small part of the Report.

2. The Report is used to circumvent the statute of limitations and it is improper for the Commonwealth to go before the IGJ without evidence of crimes to be prosecuted.
3. The Grand Jury Act is unconstitutional as applied in this matter from a due process standpoint requiring notice and a meaningful opportunity to respond which did not occur in this case since there was no discovery.
4. The preponderance of the evidence standard is inadequate in this case and a reasonable doubt standard is the only one that is appropriate for application when an individual is named outside the statute of limitations. [REDACTED] had no opportunity to challenge the Commonwealth's evidence through cross-examination.
5. The Report contains speculation and is based on hearsay.
6. No legitimate purpose is served by including a current picture of [REDACTED] in the Report.

The Commonwealth responds to the identified issues as follows:

1. Investigation #18 was a search for evidence following a Victim presenting to the District Attorney. The investigation's intent cannot be deemed improper simply because it did not yield evidence of chargeable crimes.

2. The process developed into a catharsis for victims with a recommendation that counseling resources be provided to other potential victims who were referenced in the testimony and who may now come forward.
3. [REDACTED] was interviewed by an investigator two weeks before his appearance in front of the IGJ and was aware of the subject matter to be explored through his testimony.
4. The preponderance of the evidence standard is provided in the Grand Jury Act and there was no deprivation of liberty or life.
5. The Grand Jury Act permits hearsay evidence.
6. The picture of [REDACTED] was provided as were pictures of victims in other grand jury investigations.

The remedy sought by [REDACTED] is a permanent sealing of the Report. In the alternative, he proposes recision of identifying information. If both proposals are rejected by the Court, [REDACTED] requests that his Response be attached to the Report and that this Court certify the matter for interlocutory appeal pursuant to 42 Pa.C.S.A. Section 702.

APPLICABLE LAW

During the term of the IGJ, two very significant opinions were provided by Pennsylvania's Supreme Court and it is those pronouncements of law that guided

this Court through Investigation #18 and the subsequent challenge to its Report. In the first opinion filed July 27, 2018, *In Re: Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560 (Pa. 2018) ("*Fortieth Grand Jury I*"), the Supreme Court began its analysis of a challenge to the grand jury report in that matter with a discussion of grand jury reports generally:

"The grand jury is an institution with deep historical roots. The grand jury is an English institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. By virtue of the Fifth Amendment, grand jury prerogatives were given institutional status in the United States, and grand juries have ever since played a fundamental role in our criminal justice system. The operation of grand juries in a unique, non-adversarial, secret environment -- where qualitative rules pertaining to the consideration of evidence do not apply and witnesses are not subject to cross-examination -- offers substantial advantages in terms of the gathering and review of information."

Fortieth Grand Jury I, 190 A.3d at 568 (*citations omitted*). But these features also implicate limitations. As related by a federal district court:

"The need for safeguards on the grand jury is enhanced by the fact that it is not bound by the rules of evidence that normally protect the publicly accused from baseless or unduly prejudicial information. The grand jury can hear any rumor, tip, hearsay, or innuendo it wishes, in secret, with no opportunity for cross-examination."

In re Grand Jury Proceedings, Special Grand Jury 89-2, 813 F.Supp. 1451, 1463 (D.Colo. 1993)(*citations omitted*). The Pennsylvania Supreme Court expanded on this concept:

Manifestly, secrecy will serve as a check on grand jury power, since, to the degree that the grand jury's influence is confined to the jury room, the potential for impact on reputational rights is constrained. Nevertheless, the

General Assembly has authorized Pennsylvania investigating grand juries to issue public reports...[S]uch reports -- like [sic] the institution of the grand jury itself -- have a long lineage. The reportorial function of the grand jury, serving to enlighten the community on matters of public importance, occupies an important position in our democratic form of government.

Significantly, however, courts draw a sharp distinction between grand jury reports that speak generally to public affairs and those that impugn named persons. So long as grand jury reports relate to general conditions affecting the public welfare and without reflecting specifically upon the character, or censuring the conduct, of individual citizens they serve a wholesome purpose and are frequently followed by beneficial results to the community. A man should not be subject to a quasi-official accusation of misconduct which he cannot answer in an authoritative forum. In this regard, a substantial controversy arises when the reporting function is directed toward targeted condemnation. Although there are important even compelling reasons for allowing a grand jury to bring the misconduct and malfeasance of specific public officials to light, this beneficial aspect of grand jury reporting must give way to the need for due process and fairness to the individual. Courts and commentators have long recognized the vulnerability of unindicted individuals who are openly criticized in grand jury reports."

Fortieth Grand Jury I, 190 A.3d at 569-70 (*citations omitted*).

Before the Court were petitions challenging the public release of the Fortieth Statewide Investigating Grand Jury Report 1 ("Report 1") to prevent the disclosure of findings of criminal and/or morally reprehensible conduct on the part of the appellants. The grand jury proceedings were initiated by the Pennsylvania Attorney General to investigate allegations of child sexual abuse by individuals associated with the Roman Catholic Church. The grand jury also investigated the alleged failure to make mandatory reports, the commission of acts including endangering the welfare of children and obstruction of justice by Church officials,

community leaders, and/or public officials. The submitted report was not written in conventional "investigatory" terms but rather sought to identify more than 300 "predator priests" by name and further to describe their specific conduct by offenders and those who concealed their activities. The Court noted that it is not inherent in the production of a report to condemn named individuals but sometimes reports have been used in this manner and "plainly the grand jurors believed that it was essential to do so here." *Id.*, at 564. The supervising judge was required to examine the report and the confidential record before accepting and filing the report after a determination that the report was based on facts received in the course of an authorized investigation and supported by the preponderance of the evidence standard. 42 Pa.C.S. § 4552(b). The statute further provides that written responses by individuals who are not indicted but about whom a report is critical may be included with the report at the discretion of the supervising judge. 42 Pa.C.S. § 4552(e).

In that case involving Report 1, the supervising judge accepted the report after determining that it was supported by a preponderance of the evidence and permitted living implicated individuals to submit responses to the report's material findings. Dozens of challenges were submitted asserting denial of constitutional rights, particularly the right to reputation without due process of law. Many

asserted that they either were not aware of the proceedings or were not permitted to appear before the grand jury.

The narrow issue before the Pennsylvania Supreme Court in *Fortieth Grand Jury I* was whether an investigated individual is entitled to participate in an evidentiary hearing prior to the release of the report. To put the issue in other words, are the named priests entitled to a “pre-deprivation hearing” as a manifestation of fundamental due process and fair play? The Commonwealth’s position was that the opportunity for a written response to the written report satisfied due process concerns. The Justices reviewed cases from other states that provided different approaches to grand jury proceedings and the protection of reputational rights. The Court ultimately concluded that “the right of citizens to security in their reputations is not some lesser-order precept,” *Fortieth Grand Jury I*, 190 A.3d at 572, and that “this foundational assurance of reputational security has remained substantively extant through four iterations of the state charter, dating back to our Constitution of 1790,” *Id.* at 573. Reputational interests are viewed as being on the same level as matters pertaining to life, liberty, and property. *Id.* The Court went on to state that “[i]n the context of such fundamental rights, the historical acceptance of the institution of the grand jury can go only so far in justifying the relaxation of procedural requirements for the protection of those rights.” *Id.*

This seminal case interpreting the Grand Jury Act and the issuance of reports support ██████ assertions that, with reputational interests on the highest plane and equal with those pertaining to life, liberty and prosperity: (1) the right of written response is not enough protection; (2) the preponderance of the evidence review by a supervising judge as provided in the Act is not a sufficient safeguard to obviate the necessity to provide individuals an opportunity to respond to the grand jury's criticism in a meaningful way; and (3) the Grand Jury Act is subordinate to the Constitution. However, in *Fortieth Grand Jury I*, the Justices could not agree on the issue of availability and/or scope of a pre-deprivation process. The Justices did agree upon the temporary remedy of excision prior to oral argument and deliberation.¹

The term of the Fortieth Grand Jury had expired so the Supreme Court appointed a Special Master to hear objections and made determinations on the requested redactions. A timeline was set forth for release of an interim version of a redacted report pending resolution of all challenges. It is clear from this first opinion that due process in the context of the grand jury proceedings must be measured in terms of a meaningful opportunity to be heard encompassing the concept of participation in the process at a time when it will be meaningful.

¹ Justice Baer wrote a concurring opinion preferring not to comment on the specific nature of, or remedy for, any possible deficiency of pre-deprivation process prior to oral argument. See *Fortieth Grand Jury I*, 190 A.3d at 579.

The second opinion by the Pennsylvania Supreme Court in the matter was filed on December 3, 2018. *In re: Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712 (Pa. 2018) ("*Fortieth Grand Jury II*"). The Court held that the redactions would be made permanent noting that the grand jury could not be reassembled to hear additional testimony as their term had expired and further, the Act did not permit the supervising judge to conduct a hearing to receive additional evidence and make findings of fact. *Id.* at 721, 723-24.

The petitioners in *Fortieth Grand Jury II* suggested that New York law or Alaska procedure be viewed as instructive and referenced eighteen states where grand juries are prohibited from naming individuals in a report unless the conduct alleged in the report results in criminal charges being filed against the individuals. *Id.* at 717-718. They proposed that the unindicted individuals had a right to: (1) appear and be heard before the grand jury and the supervising judge; (2) discovery of the Commonwealth's evidence and to make challenges thereto; (3) cross-examine witnesses; (4) make their own counseled presentation of evidence; and (5) provide rebuttal or exculpatory evidence. *Id.* The Commonwealth proposed that either the grand jury be brought back to consider factual disputes or a new grand jury be empaneled. The Commonwealth also noted that investigative reports critical of individuals are also issued by the Auditor General and Inspectoral

General as well as inter-branch commissioners tasked with investigating a wide variety of matters. *Id.*

In this second review of the challenges, the Supreme Court held that the grand jury is a creature of statute reflecting the legislature's ultimate policy decisions and, therefore, the Court in our constitutionally established tripartite form of governance may not usurp the province of the legislature by rewriting the Act to supplement with hearing and evidentiary requirements. *Id.* at 721. The Court concluded that while it may not correct the Act, it could ensure that unconstitutional harm not result from an infirm process. *Id.* at 723. The remedy provided was permanent redaction. *Id.*

The concurring opinion of Justice Baer noted his desire that guidance be given to the Commonwealth as to how it should ensure due process in future investigating grand juries where the individual's right to reputation is implicated absent any further legislative action to address the identified constitutional deficiencies. *Id.* at 724-25. He reiterated the need for the Commonwealth to provide reasonable notice of accusations and a meaningful opportunity to respond. *Id.*

Justice Dougherty took the matter one step further in his concurring opinion by noting his dissatisfaction with the majority's decision that did little to illuminate

a path forward. He outlined “minimum procedures” to assure due process to unindicted individuals criticized in an investigating grand jury report. They are as follows:

1. A meaningful appearance before the grand jury with full knowledge of the allegations made against the individual;
2. A report supported by citations to exhibits and transcript pages if said report is critical of named but non-indicted individuals;
3. An opportunity to file written objections and argue inclusion of those objections in the report after being provided critical portions of the report;
4. An examination of the report and record by the supervising judge to determine through a sufficiency analysis relying on the preponderance of the evidence standard whether the report is properly based upon facts received in the course of an investigation that is authorized by the Act; and
5. A public response by the criticized individual if the report is approved by the supervising judge.

ANALYSIS

It is in the context of these timely Supreme Court opinions that the facts of our case must be analyzed. Both opinions were issued during the course of the Investigating Grand Jury's examination of the [REDACTED] conduct. Presentment #18 was authorized by the supervising judge for investigation into abuse and improper influence by [REDACTED]. Three witnesses appeared in person before the IGJ before *Fortieth Grand Jury I* was issued. Two additional witnesses were heard by the IGJ and [REDACTED] was interviewed before the issuance of *Fortieth Grand Jury II*. Focusing on the holding of *Fortieth Grand Jury I* and the supervising judge's responsibility to ensure a meaningful opportunity to be heard and participation at a time when it will be meaningful, [REDACTED] was afforded an interview wherein the allegations were outlined two weeks before he appeared before the IGJ with advance notice.

Prior to testifying, [REDACTED] was administered an oath after being fully advised of his right to counsel at all stages of the proceedings. No issues relating to competency were apparent at that time and in the review of the record of both [REDACTED] transcribed interview and testimony before the IGJ, competency is not an issue. Although raised in [REDACTED] objection, this matter was not developed at the time of argument and is therefore given no further weight in this analysis.

The report was submitted to the supervising judge and after thorough review of the record it was approved using the preponderance of the evidence standard provided by statute. It is important to note that there is no challenge to the Court's determination that the evidence met the preponderance of evidence standard. Rather, [REDACTED] claims that a reasonable doubt standard was necessary rather than the preponderance of evidence one applied but this assertion finds no support in the law. The approved report was served on [REDACTED] with an opportunity to respond before its public issuance. After [REDACTED] obtained counsel, an extension of time was given for the filing of any response or objection.

From these facts, it is clear that the Commonwealth was aware of its duty to afford meaningful due process to [REDACTED] and did so by first conducting an interview where the allegations of witnesses were discussed and questioning [REDACTED] about those same matters when he appeared before the IGJ. This Court had the benefit of the decision in *Fortieth Grand Jury II* when conducting its statutory obligation of record review before approval of the Report. Additional due process was afforded [REDACTED] in providing him with a complete copy of the Report in advance of its release and in affording him an opportunity to file a response.

Our process in this matter follows the outline of "minimum procedures" in Justice Dougherty's concurring opinion and is in full compliance with his suggested guidelines. This Court does note that the Report contains exhibits and

transcript references without including page numbers. However, given that the record is not voluminous and the Report is quite thorough, this deviation does not appear to be of significance in overall compliance with this suggested standard.

We determine that the constitutional protections provided in this matter to ensure due process for [REDACTED] are in compliance with the direction provided by the Act and the Supreme Court opinions *Fortieth Grand Jury I* and *Fortieth Grand Jury II*. [REDACTED] was afforded a meaningful opportunity to participate in the process.

From its inception, Investigation #18 had the approval of the supervising judge. It was not presented as a shaming mission. No evidence was uncovered suggesting that [REDACTED] should be subjected to criminal charges. This fact does not, however, undo the propriety of the approved mission of Investigation #18. The intent of the investigation cannot later be deemed improper because chargeable evidence was not uncovered.

Pennsylvania is not a state where reports can only be approved if individuals are charged. We are cognizant that reputational interest garners the highest protection in Pennsylvania. We also find that the investigation by the Franklin County Grand Jury complied with the requirements of the Investigating Grand Jury Act and the procedural due process requirements as articulated in *Fortieth Grand Jury I* and *Fortieth Grand Jury II*.

The Commonwealth did not set out with the goal of harming [REDACTED] reputational interests. A victim came to the Commonwealth seeking justice for wrongs committed against him decades ago. The IGJ did not know at the inception of this investigation whether chargeable crimes within the statute of limitations existed. The investigation uncovered additional victims including four who bravely provided anguishing testimony. The process led the IGJ to determine it was compelled to issue a report and provide counseling resources for other potential victims who may come forward given the reference to the number of victims by all who testified.

Significantly, those words regarding other potential victims did not come from just the four adult men who testified to the abuse suffered at the hands of [REDACTED] when they were teenagers some forty years ago. Those words also came from [REDACTED] himself who estimated the number of victims of his abuse to be 16 to 18. This is an important factual distinction from the case involving the priests and the Roman Catholic Church. Here we have an admission from the unindicted person who is protected by the statute of limitations from criminal prosecution after he was afforded all the protections of due process.

For all of these reasons, this Court approves the public release of the Report submitted in Investigation #18 of the Franklin County Investigating Grand Jury. We will, however, require the picture of [REDACTED] to be removed from the Report

before its public release. We also will permit [REDACTED] an additional 20 days from the date of the accompanying order to submit a final version of his response to the Report to be attached before public release.

**IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT
OF PENNSYLVANIA - FRANKLIN COUNTY BRANCH**

	:	INVESTIGATING GRAND JURY
	:	
In re: Grand Jury	:	No: MD-516-2016
Investigation No. 18	:	
	:	
	:	Honorable Carol L. Van Horn

ORDER OF COURT

AND NOW THIS 13th **day of February, 2019,** the Court having conducted a review of the record and the Grand Jury Report dated December 21, 2018, in the above-captioned matter and determined that the Report is supported by a preponderance of the evidence standard as required by law and further noting that the Petitioner has been afforded meaningful due process in accordance with the opinions included in *In re: Fortieth Statewide Investigating Grand Jury*, 197 A.3d 712 (Pa. 2018),

IT IS HEREBY ORDERED THAT the referenced Report will be publicly issued after removal of Petitioner's photograph on page 42 of the Report.

THIS OPINION AND ORDER and the Grand Jury Report shall be sealed pending final Order for release after Petitioner is afforded twenty (20) days from this date to submit a final response for consideration as an attachment to the Report.

Petitioner has the right to appeal the final Order in this matter. Pursuant to Pa.R.A.P., Rules 902 and 903, notice of appeal must be filed within thirty (30) days of the final Order.

This Opinion and Order, and the Grand Jury Report dated December 21, 2018 will remain sealed pending the issuance of a final Order and subsequent appeal.

Pursuant to the requirements of Pa. R. Crim. P. 114, the Clerk of Courts shall immediately docket this Opinion and Order of Court and record in the docket the date it was made. The Clerk shall forthwith furnish a copy of the Opinion and Order of Court, by mail or personal delivery, to each party or attorney, and shall record in the docket the time and manner thereof.

By the Court,



Carol Van Horn, P. J.

Copies:

Matt Fogal, Esq., District Attorney

Stephanie Cesare, Esq., Counsel for [REDACTED]

Brian P. Platt, Esq., Counsel for [REDACTED]